

**STATE OF NORTH DAKOTA**  
**OFFICE OF SECURITIES COMMISSIONER**

IN THE MATTER OF:	)	
	)	
Preferred Trust and Management,	)	<b>ADMINISTRATIVE LAW JUDGE'S</b>
LTD., and Mark Dostert	)	<b>RECOMMENDED FINDINGS</b>
	)	<b>AND RECOMMENDED ORDER</b>
Respondents.	)	

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**DIGEST OF CASE HISTORY AND ISSUES**

On April 10, 2001, the Securities Commissioner issued a separate Cease and Desist Order, Notice of Civil Penalty, and Notice of Right to Request a Hearing ("Cease and Desist Order") to Preferred Trust and Management, LTD. ("Preferred Trust"), and Mark Dostert ("Dostert"). On May 27, 2003, the Securities Commissioner requested the designation of an administrative law judge ("ALJ") from the Office of Administrative Hearings to conduct a hearing and to issue recommended findings of fact and conclusions of law, and a recommended order in regard this matter. On May 28, 2003, the undersigned ALJ was designated to preside as hearing officer in this matter.

This matter is one of many in regard to Preferred Trust and individually named Respondents that began in 2001. In other words, in 2001, the Securities Commissioner brought many similar actions against separately named individual Respondents and Preferred Trust, and Dostert is one of them. All of these similar actions were internally administratively stayed by the Securities Commissioner or were formally stayed by this hearing officer while one of the matters (a consolidated matter involving three of the individual Respondents) was appealed to the North Dakota Supreme Court on an order issued by the Securities Commissioner. *Henry, et al. v. N.D.*

*Securities Com'r*, 659 N.W. 2d 869 (N.D. 2003). After the Court ruled that an order on a motion to dismiss was not a final order but interlocutory, and could not be reviewed except in conjunction with a decision on the merits, the Securities Commissioner sent the Dostert matter, along with several other pending matters, to the Office of Administrative Hearings for hearing.

At the hearing, Mr. Dostert made a similar motion to dismiss on essentially the same basis as respondents in the *Henry* matter, that the Securities Commissioner did not timely act on his request for a hearing, as required by N.D.C.C. § 10-04-12(2), but the ALJ denied the motion for essentially the same reasons he denied it in the *Henry* matter. There is no doubt that a considerable period of time passed between the issuance of the Cease and Desist Order and the request to the Office of Administrative Hearings to designate a hearing officer, but it appears that the Securities Commissioner appropriately declined to proceed on any of these related matters until the one on appeal was decided because if the Supreme Court had decided in favor of the *Henry* respondents there would have been no reason to proceed against any of the other respondents because all of the proceedings would be in violation of N.D.C.C. § 10-14-12(2). Of course, as it turns out, the Supreme Court did not decide the issue in the *Henry* matter so that it remains an issue in this matter. Although the procedural issue in this matter is somewhat different, factually, it is better to deny and let the courts decide it on appeal.

On June 11, 2003, the ALJ issued a Notice of Hearing scheduling an August 15, 2003, hearing. On August 14, 2003, Dostert requested that the hearing be rescheduled and this matter was rescheduled for hearing on October 31, 2003, pursuant to a Notice of Rescheduled Hearing being issued by the ALJ on September 22, 2003.

The hearing was held as rescheduled on October 31. Dostert appeared and represented himself. Special Assistant Attorney General Matthew O. Bahrenburg represented the Securities

Commissioner. The Securities Commissioner called as witnesses Dostert and three other witnesses, as well as its investigator and examiner, Kelly Mathias. Dostert also testified in his own behalf but called no other witnesses, choosing only to cross-examine the Securities Commissioner's witnesses. Twenty-nine exhibits were offered. *See* attached exhibit list. All but exhibit DD were at least conditionally admitted. Dostert objected to several and the ruling on the admission of those exhibits was conditional. *See* below.

The parties requested to file briefs. The Securities Commissioner filed a Post-Hearing Brief and Closing Arguments on November 10, 2003. Dostert's Post-Hearing Brief and Closing Arguments were received by the ALJ on November 26, 2003. On November 26, 2003, the Securities Commissioner stated by email that no reply brief would be filed. Therefore, the record in this matter is closed as of November 26, 2003.

At the hearing, Dostert objected to a computer disc (CD Rom), which contained information taken from the computer of Fred Keiser, and to any exhibits taken from the computer disc, and, essentially, because the ALJ conditionally admitted them, his objection will be taken as a motion to strike those exhibits. Exhibit D is the computer disc in question. Exhibits E, and G-Q are taken from exhibit D. Exhibit F is Mathias' summary compiled from several of the exhibits taken from exhibit D. Exhibit AA is a Mathias summary sheet for Mark Dostert taken from documents on Keiser's computer. .

As an evidentiary matter, the ALJ **strikes** the admission of exhibits D, E, G-Q, F, and AA as to the Respondent Mark Dostert in this matter. In an Order on Motion in Limine issued by the ALJ on June 4, 2003, in regard to all of the Preferred Trust matters (again, there were many more individual Respondents than these five), the ALJ allowed the admission of trial and deposition testimony of three witnesses, in lieu of them appearing at the hearing, as foundation for certain

documents taken from the computer of Fred Keiser, the promoter and principal of Preferred Trust. The ALJ did not rule on the admissibility of the documents from the Fred Keiser computer. The ALJ said that if proper objection is made as to the relevancy of any documents as to any specific Respondent, the Securities Commissioner must make a showing as to how the documents are relevant (admissible) evidence as to the objecting Respondent. June 4 Order on Motion in Limine.

Exhibits E, G-Q, and D are hearsay documents seized from and found on the Fred Keiser computer, but the question under the business records exception to the hearsay rule is whether they are true and correct copies of records of Preferred Trust kept in the ordinary course of business of that entity, and, even if they are true and correct copies of Preferred Trust records, whether they are reliable, relevant records.

There was no one at the hearing associated with Preferred Trust in such a way as to be able to testify as to whether the offered exhibits were true and correct copies of records or, even if they were true and correct copies of records, whether they are reliable, relevant records as to the individual Respondents. Accordingly, the documents may be admissible against Fred Keiser, but he is not a party to this matter. The documents may also be admissible as to the Respondent Preferred Trust. The documents are not admissible as to this Respondent, Dostert. There is no foundation that the offered exhibits are the official business records of Preferred Trust and no testimony about for what the offered records are used.

Under the cases cited by the Commissioner, *U.S. v. Hathaway*, 798 F. 2d 902 (6th Cir. 1986) and *Dorsey v. City of Detroit*, 858 F.2d 338 (6th Cir. 1988), some witness must be familiar with the record keeping system of Preferred Trust for these records to be admitted. No witness was familiar with the offered exhibits. There was no knowledge available about the procedures

under which the records were created. There was no evidence about what these records mean in the business context, if anything, for Preferred Trust. There was nothing-reliable offered in regard to how to interpret these records, especially not as to the Respondent. Mr. Mathias testified about them and could even make a summary about them. He could interpret them and he said that they should be interpreted in their ordinary sense, according to common sense. However, clearly, the offered exhibits were not common and ordinary business records of a legitimate investment business. Mathias, both counsel, and many of the witnesses recognized the Fred Keiser business records as part of a fraudulent investment scheme. They were not ordinary in any sense and not subject to interpretation by common meaning or ordinary sense. They are evidence of a concocted, fraudulent investment scheme. If they were used in the operation of Preferred Trust, how they were used and what they really mean is the subject of speculation.

Alternatively, the ALJ could have admitted the offered exhibits as to the Respondent Preferred Trust but given them little if any weight as to the individual Respondent, Dostert, because the documents, as to Dostert, were not in any way shown to be reliable, relevant evidence. In fact, there was evidence at the hearing that at least some of the specifics of the offered exhibits were not correct and were not reliable. There was evidence at the hearing that the meaning of some of the words used by the author of the records (and even the author is not known for certain, though it is assumed to be Fred Keiser) are in need of further explanation because their use is not clear in this context and even if one believes he knows what they mean, there are some errors in the records following that assumed usage. These exhibits should be stricken.

Finally, there arose at the hearing the question of immunity for Dostert arising out of the related district court proceeding. Dostert claims that he received some kind of immunity as a result of testifying in the district court action. Mr. Barhrenburg provided a copy of the relevant

portions of the transcript from district court. *See* his brief at 6 and attachments. There is nothing in that portion of the transcript that indicates Dostert is granted any general immunity in subsequent or concurrent administrative actions. Dostert has not provided any other document showing that he is entitled to immunity. Dostert did not claim a Fifth Amendment privilege of immunity from self-incrimination at this administrative hearing and the Securities Commissioner did not use Dostert's testimony from the District Court action in this proceeding. None of the evidence produced at this hearing was derived from Dostert's previous testimony.

Based on the evidence admitted at the hearing, including testimony, and the briefs of the parties, the administrative law judge makes the following recommended findings of fact and conclusions of law.

### **FINDINGS OF FACT**

1. The Securities Commissioner investigated the activities of Mr. Frederick W. Keiser of Minot and seized a computer from him. As a result of that investigation, separate Cease and Desist orders were issued against Preferred Trust and, amongst others, the individual Respondent in this matter, Dostert.

2. Much of the documentary evidence offered and admitted at the hearing in this matter was documentary evidence obtained from Mr. Keiser's computer or from the website of Preferred Trust. The entire contents of the Keiser computer and hard drive, according to the assertions of the Commissioner, voluminous contents, were transferred to a CD, much of which was then printed as exhibit D (in other hearings exhibit D was the CD itself and it was not reduced to hard copy). Exhibits A, B, and C are documents copied from the website of Preferred Trust. However, exhibits E and G-Q are not from the Website of Preferred Trust but, apparently, from the business records of Preferred Trust in Mr. Keiser's possession, taken from his computer

and transferred to the CD. Again, exhibits F and AA are the investigator's summaries of information from the CD. Again, exhibits D, E, G-Q, F, and AA are stricken from the record in this matter.

3. Still, Exhibits A-C and other evidence identifies Preferred Trust as a fraudulent investment scheme. Mr. Mathias testified that Preferred Trust is a fraudulent investment scheme. There was no evidence offered to the contrary.

4. Dostert knew about the Preferred Trust website and had knowledge about the fraudulent investment scheme, even if he did not actually know that it was a fraudulent scheme.

5. The Preferred Trust investment scheme (hereinafter the "scheme") is a security as defined in N.D.C.C. 10-04-02(15).

6. The scheme was not registered as a security in North Dakota and is not exempt from registration under the Securities Act. N.D.C.C. §§ 10-04-04; 10-04-05. Neither is the scheme an exempt transaction under N.D.C.C. § 10-04-06.

7. The Respondent, Dostert, is not currently and has never been registered as a securities investment advisor representative or securities agent in North Dakota.

8. Although the documents from the Keiser computer showing that the Respondent is listed as having referred other individuals to the scheme are not admitted, there is still other evidence showing an offer or sale of a security by the Respondent. The stricken evidence specifically shows that Dostert referred at least 15 investors to the scheme, but at the hearing Dostert's own testimony also shows that he referred these 15 persons to the scheme, each of whom ultimately invested in the scheme, based, in part, on Dostert's referrals. Dostert communicated to these investors that he was personally invested in the scheme. Dostert stated that he referred those 15 investors to the Preferred Trust website in order to complete their

investment. Dostert also stated that he knew he was entitled to receive compensation (a bonus) based on each of the referrals he made to the scheme. Dostert testified that on several occasions he provided his Preferred Trust account number to investors he referred so that they could make their investment in the scheme. He testified that he understood that it was necessary that he provide his account number to identify him as the referrer. Indeed, with respect to at least one investor he referred, Dostert provided the investor with the Preferred Group Application Form upon which Dostert has already written his Preferred Trust account number.

9. The evidence also demonstrates that Dostert also facilitated a larger investment in another Preferred Trust program known as the Phoenix program. The testimony was that this program required a \$25,000 minimum investment. Dostert took a personal check from one of the 15 investors he referred (exhibit V) and purportedly commingled those assets with the assets of other investors in order to meet the minimum investment amount of the Phoenix program. This investment could not have been made apart from the facilitating activities of Dostert.

10. The evidence at this hearing shows more than the evidence showed at some of the other hearings on Preferred Trust. It shows more than possibilities. It shows that Dostert was following through on this scheme by Fred Keiser to receive compensation from securities referrals, and monies were likely earmarked for him, even if there was no actual sale by Dostert. If the scheme had been allowed to play out further, it is clear, Dostert would have been entitled to receive what he intended to receive, and would likely have received a percentage of monies invested by others based on his referrals of them to the scheme. With some other Respondents in the other Preferred Trust hearings this was not clear. In those other matters, the Respondents were victims more than anything else. It appears that Dostert was more than a victim; he was a willing, knowing participant, too. He referred others to the scheme with the knowledge that he



would be entitled to compensation if they invested. These referrals are an "offer for sale" or "offer to sell" as defined in N.D.C.C. § 10-04-02(10).

11. The scheme constitutes a security. The evidence shows that the scheme was investment of money in a common enterprise with the expectation of profits based on the efforts of others. N.D.C.C. § 10-04-02(15).

12. The scheme was offered through Frederick Keiser out of his office in Minot, North Dakota. Dostert was a resident of North Dakota at the time. Most of the investors referred by Dostert are residents of North Dakota. All of the activities relating to Dostert's referrals and the investment by those referred by him to the scheme took place in North Dakota.

### **CONCLUSIONS OF LAW**

1. The evidence offered and admitted in this matter shows, notwithstanding the stricken evidence, that Dostert violated the provisions of N.D.C.C. § 10-04-04 that precludes any person from selling or offering to sell any security in this state unless the security is registered or exempt from registration. The scheme is a security under N.D.C.C. § 10-0-02(15). The scheme had not been registered with the Securities Commissioner under N.D.C.C. §§ 10-04-07, 10-04-07.1, 10-04-08, or 10-04-08.1, and was not an exempt security under N.D.C.C. § 10-04-05, and had not been offered for sale or sold in exempt transactions under N.D.C.C. § 10-04-06. The evidence at the hearing shows that Dostert referred others to the scheme with the knowledge that he would be entitled to compensation when those other persons invested. The referrals of those persons constitutes an "attempt to offer to dispose of ... a security or interest in a security for value," and therefore would be an "offer for sale" or "offer to sell" as defined in N.D.C.C. § 10-04-02(10). When the persons actually invest, that referral becomes a sale as defined in N.D.C.C.

§ 10-04-02(14). Dostert acknowledged referring several investors to the scheme and communicated that he was personally invested in the scheme. Dostert knew about the bonuses available for those referrals. There is enough evidence to establish that Dostert was a seller within the meaning of the language of N.D.C.C. § 10-04-02, and the prohibitions of N.D.C.C. § 10-04-04. He was offering to sell and selling. The sales of the scheme were made in North Dakota and are therefore subject to the jurisdiction of the Securities Commissioner.

2. The evidence offered and admitted in this matter shows, notwithstanding the stricken evidence, that Dostert violated the provisions of N.D.C.C. § 10-04-10. Dostert was acting as an unregistered agent of the unregistered securities dealer Preferred Trust (through Fred Keiser) when he referred others to Keiser for investment in the scheme. N.D.C.C. § 10-04-02(1), and (3). The scheme is a security under N.D.C.C. § 10-04-02(15). The scheme had not been registered with the Securities Commissioner under N.D.C.C. §§ 10-04-07, 10-04-07.1, 10-04-08, or 10-04-08.1 and was not an exempt security under N.D.C.C. § 10-04-05, and had not been offered for sale or sold in exempt transactions under N.D.C.C. § 10-04-06. N.D.C.C. § 10-04-10 precludes any agent from selling or offering to sell any security within or from this state except through an exempt transaction, unless that agent is registered. Dostert was an agent of Preferred Trust. N.D.C.C. § 10-04-02(1). He was unregistered.

Dostert referred others to the scheme with the knowledge that he would be entitled to compensation if the others invested. The referrals of those persons constituted "an attempt to offer to dispose of ... a security or interest in a security for value" and is, therefore, an "offer for sale" or "offer to sell" as defined in N.D.C.C. § 10-04-02(10). When the other persons actually invest, that referral becomes a sale as defined in N.D.C.C. § 10-04-02(14). Dostert acknowledged referring investors to the scheme and communicated that he was personally

invested in the scheme. Dostert knew about the bonuses available for those referrals. This evidence is enough to establish that he was a seller within the meaning of the language of N.D.C.C. § 10-04-02. Dostert was offering to sell and selling to investors in North Dakota. He was an unregistered agent. Thus, he is in violation of N.D.C.C. § 10-04-10.

3. Further, the scheme was a fraudulent investment scheme. Any person who offers for sale or sells investments in a fraudulent investment scheme is engaging in a device, scheme or artifice to defraud those investors. Additionally, any person who solicits investors to invest in a fraudulent program is engaging in a course of business that operates as a fraud or deception upon investors. There is no intent required in N.D.C.C. § 10-04-15. Dostert acknowledged the existence of the Preferred Trust website and knew about the nature of the scheme, even if he did not actually know that the scheme was fraudulent. Dostert violated the provisions of N.D.C.C. § 10-04-15 by either engaging in a scheme to defraud or engaging in a course of business that operates as a fraud or deception upon investors.

4. Under N.D.C.C. § 10-04-16, the Securities Commissioner may impose a \$10,000 civil penalty against Dostert for each violation of N.D.C.C. ch. 10-04. The evidence shows 15 violations of N.D.C.C. § 10-04-04 (one violation for each investor to which Dostert admits referring the scheme). The evidence shows 15 violations of N.D.C.C. § 10-04-10 (one violation for each investor to which Dostert admits referring the scheme). The evidence shows 15 violations of N.C.C.C. § 10-04-15 (one violation of the prohibition against fraudulent practices for each of the 15 frauds in which Borud was engaged that were perpetrated upon those 15 investors). Therefore, the Commissioner has authority to impose a civil penalty against Dostert in the amount of \$450,000.

### **RECOMMENDED ORDER**

Because the greater weight of the evidence shows that Dostert violated the provisions of N.D.C.C. §§ 10-04-04, 10-04-10 and 10-04-15, the Cease and Desist Order issued against him was appropriate and the imposition of civil penalties is authorized. Therefore, it is **ordered** that the Cease and Desist Order issued against Dostert on April 10, 2001, shall remain in effect, indefinitely, unless otherwise lifted or dismissed by the Securities Commissioner. Further, it is **ordered** that a civil penalty be imposed against Dostert in the amount of \$10,000. Although the evidence shows that Dostert was less of a victim than others who became involved in this scheme, he was, to a certain extent, still one of Fred Keiser's victims. To impose a very large civil penalty against Dostert would seem to be unfair, especially because the scheme collapsed and Dostert, like many others, lost considerable money in the scheme.

Dated at Bismarck, North Dakota, this 4th day of December, 2003.

State of North Dakota  
Karen Tyler  
Securities Commissioner

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